

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

2005 MAY 31 PM 2:49

UNITED STATES OF AMERICA, AND
THE STATE OF COLORADO,

Civil Action No.

GREGORY C. LANGHAM
CLERK

Plaintiffs,

BY _____ DEP. CLK

v.

B&B, MINES, INC., FRENCH GULCH
MINES, INC., DIAMOND DICK CO.,
ECKERT PATCH CO., LITTLE LIZZIE
LIMITED LIABILITY COMPANY, AND
WIRE PATCH LIMITED LIABILITY
COMPANY,

Defendants.

05-CV-992-EWN-
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COMPLAINT

The United States of America ("United States"), by the authority of the Attorney General of the United States, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA") and the Secretary of the Department of the Interior (DOI), and the State of Colorado ("State"), acting at the request of the Colorado Department of Public Health and Environment ("CDPHE") and the Colorado Trustees for Natural Resources ("Trustees"), allege as follows:

STATEMENT OF THE CASE

1. This is a civil action under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9607, for the recovery of (1) response costs that were incurred and will be incurred by the United States and the State in response to releases and threatened releases of hazardous substances from

the Wellington Oro/French Gulch Site ("Wellington Oro Site") located in Summit County, Colorado and (2) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such releases. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. § 2201, the United States and the State also seek a declaratory judgment of liability for response costs that will be binding on any subsequent action or actions to recover further response costs in connection with the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to Sections 104, 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b).

DEFENDANTS

4. The B&B Mines, Inc., ("B&B") is a Colorado corporation conducting business in the State of Colorado. B&B is the operator of facilities located at the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

5. French Gulch Mines, Inc., ("French Gulch") is a Colorado corporation conducting business in the State of Colorado. French Gulch is the operator of facilities located at the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

6. Diamond Dick Company, ("Diamond Dick") is a Colorado corporation conducting business in the State of Colorado. Diamond Dick is the owner of facilities located at

the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

7. Wire Patch Limited Liability Company, ("Wire Patch") is a limited liability Colorado corporation conducting business in the State of Colorado. Wire Patch is the owner of facilities located at the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

8. Little Lizzie, LLC, ("Little Lizzie") is a Colorado limited liability corporation conducting business in the State of Colorado. Little Lizzie is the owner of facilities located at the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

9. Eckart Patch Company, ("Eckart") is a Colorado corporation conducting business in the State of Colorado. Eckart is the owner of facilities located at the Wellington Oro Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

FACTUAL BACKGROUND

10. The Wellington Oro Site is a former mine and mill complex located in Summit County, Colorado, approximately 2.2 miles upstream from the confluence of French Creek and the Blue River, in an area known as the Golden Horseshoe. Extensive placer and underground lode mining occurred throughout the Golden Horseshoe beginning in the late 1850's to the 1960's. Floating dredge boats were used to placer mine the valley floor for gold. Lode mining was concentrated on the steep valley sides where lead, zinc, and silver sulfide ores and gold ores were extracted through an extensive network of adits and tunnels.

11. The Wellington Oro Site was the largest mining operation in the valley. Its underground workings consist of over twelve miles of tunnels, adits, drifts, stopes and crosscuts, approximately half of which are below the elevation of the groundwater table.

12. In August of 1998, EPA, after consultation with CDPHE, initiated a non time-critical removal action at the Wellington Oro Site to address mining wastes containing elevated levels of lead and arsenic. On April 29, 1998, EPA, after consultation with CDPHE, issued Unilateral Administrative Order CERCLA VIII-98-12 ("First UAO") to the Defendants to conduct an engineering evaluation and cost analysis ("EE/CA") to determine the nature and extent of surface contamination. The Defendants performed this work in accordance with the First UAO. This EE/CA documented the presence of numerous hazardous substances in soils at the Wellington Oro Site including lead and arsenic in levels that threatened human health and the environment.

13. On September 23, 1998, EPA, after consultation with CDPHE, issued an action memorandum selecting a non-time critical removal response action that provided for the consolidation and capping roaster fines, mill tailings and waste rock at the Wellington Oro Site. Also on September 23, 1998, EPA issued Unilateral Administrative Order CERCLA VIII-98-21 ("Second UAO") to the Defendants to implement the surface waste response action. The Defendants performed this work in accordance with the Second UAO.

14. On July 12, 1999, EPA, after consultation with CDPHE, issued Unilateral Administrative Order CERCLA VIII-99-13 ("Third UAO") to the Defendants to conduct an engineering evaluation and cost analysis ("EE/CA") to determine the nature and extent of metals contamination emanating from the Wellington Oro Site into French Creek and the Blue River. The Defendants performed this work in accordance with the third UAO. This EE/CA

documented the presence of numerous hazardous substances emanating from the underground workings of the Wellington Oro mine including zinc and cadmium and also indicated that natural resources as defined by CERCLA Section 101(16) have been injured, destroyed and/or lost, and that such injury is ongoing.

15. On November 24, 2004, EPA, after consultation with CDPHE, issued an action memorandum selecting a non-time critical removal response action to address the impacts of metals contamination from the Wellington Oro Site on water quality in French Creek and the Blue River. This non-time critical response action has not been implemented.

LAW GOVERNING CLAIMS FOR RELIEF

17. Sections 104(a)(1) and (b) of CERCLA, 42 U.S.C. § 9604(a)(1) and (b), provide in pertinent part:

Sec. 104. (a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource) or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

SEC. 104. (b)(1) Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct

response actions, to recover the costs thereof, and to enforce the provisions of this Chapter.

18. The President has delegated his authority under Sections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), to the Administrator of the EPA to arrange for the cleanup of hazardous waste or to conduct investigations and studies as necessary to determine the need for, and extent of, such a cleanup.

19. Section 25-16-103 of Colorado Revised Statutes authorizes CDPHE to participate in the federal government's implementation of CERCLA and the selection and performance of responses and remedial actions.

20. The President has designated the Secretary of the Interior as trustee for various natural resources. Executive Order 12580, as amended, delegates to the Secretary of the interior responsibilities as a natural resource trustee as described in 42 U.S.C. § 9622(j). Natural resources within the trusteeship of the Secretary of the Interior include, but are not limited to, migratory birds; threatened and endangered species and their supporting ecosystems; and lands, waters, and minerals owned or managed by the DOI. 40 C.F.R. § 300.600(b)(2).

21. The secretary of the Interior has designated the Regional Director of the Fish and Wildlife Service ("FWS"), Region 6, as the authorized official for natural resource damage assessment activities at the Site.

22. The State of Colorado has designated the following persons as its Natural Resource Trustees: the Executive Director of the Colorado Department of Public Health and Environment or his/her designee, the Executive Director of the Colorado Department of Natural Resources or his/her designee, and the Attorney General of the State of Colorado or his designee. Natural Resources within the trusteeship of the State of Colorado include, but are not limited to, State lands, fish, wildlife, biota, air, water, groundwater, and drinking water supplies.

23. Section 107(a) of CERCLA, U.S.C. § 9607(a), provides in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any, hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
 1. all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 2. any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 3. damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release....

24. Section 113 (g)(2)(B) of CERCLA, 42 U.S.C. § 9613 (g)(2)(B), provides, in pertinent part:

In any such action described in this subsection [an action for recovery of costs under Section 107 of CERCLA], the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

25. The United States has incurred costs in excess of \$2.5 million through

September 30, 2003, in responding to releases or threatened releases of hazardous substances from the Wellington Oro Site. The United States is continuing to incur additional response costs.

26. Through September 30, 2003, the State has incurred response costs in excess of \$10,000 at the Site to perform characterization, Engineering Evaluation and Cost Assessment activities and oversight of response actions at the Site. CDPHE will continue to incur additional response costs responding to releases or threatened releases of hazardous substances from the Wellington Oro Site.

27. Injury to natural resources under the trusteeship of the United States and the State is ongoing, and DOI and the Trustees have each incurred and will continue to incur costs associated with assessment of injuries to natural resources as a result of releases of hazardous substances from the Wellington Oro Site.

FIRST CLAIM FOR RELIEF: RESPONSE COSTS

28. The allegations in paragraphs 1 – 27 of the Complaint are realleged and incorporated herein by reference.

29. Each Defendant is a “person” within the meaning of Sections 101(21) and 107 of CERCLA, 42 U.S.C. §§ 9601(21) and 9607.

30. The Wellington Oro Site is a “facility” as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and as used in Section 107 of CERCLA, 42 U.S.C. § 9607.

31. There have been releases and substantial threats of releases of hazardous substances from the Wellington Oro Site, within the meaning of Sections 101(22), 104 and 107(a) of CERCLA, 42 U.S.C. §§ 9601(22), 9604 and 9607(a).

32. As a result of the releases or threatened releases of hazardous substances from the Wellington Oro Site, the United States and the State have each incurred and will continue to

incur response costs, including the costs of removal or remedial action as defined in Sections 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 9601(23), (24) and (25), and as used in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

33. The response actions taken by the United States and the State were necessary to protect the public health or welfare or the environment, and were not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

34. The United States and the State have satisfied any and all conditions precedent to the response actions taken and to recovery of their costs under Section 107 of CERCLA, 42 U.S.C. § 9607.

35. Defendants are jointly and severally liable to the United States and the State for all costs of response incurred and to be incurred by the United States and the State relating to the Wellington Oro Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

SECOND CLAIM FOR RELIEF: NATURAL RESOURCE DAMAGES

36. The allegations of Paragraphs 1- 27 of the Complaint are realleged and incorporated herein by reference.

37. The releases of hazardous substances from the Wellington Oro Site have caused injury to, destruction of, or loss of natural resources as defined in 42 U.S.C. § 9601(16), which natural resources belong to, are managed by, appertain to, or are otherwise controlled by the United States and the State of Colorado. Such resources include, but are not limited to, surface and ground water, drinking water, fisheries resources, sediment resources, habitat, biota, wildlife, and federally listed or threatened or endangered species.

38. Defendants are jointly and severally liable under Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), for damages for injuries to, destruction of or loss of

natural resources belonging to, managed by, controlled by, or appertaining to the United States and the State of Colorado, including the costs of assessing such injury, destruction or loss of natural resources.

PRAYER FOR RELIEF

39. WHEREFORE, the United States requests that this Court enter Judgment in favor of the United States and the State, and against each Defendant, jointly and severally:

40. Awarding the United States and the State reimbursement of all costs incurred and paid by the United States and the State in responding to releases or threatened releases of hazardous substances at the Wellington Oro Site, plus the costs of investigation and cost recovery related to such releases and this suit, plus prejudgment interest;

41. Awarding the United States and the State damages for the injury to, destruction of, or loss of natural resources and loss of use of such resources, including the reasonable costs of assessing such injury, destruction, loss, or loss of use resulting from such a release.

42. Awarding the United States and the State their enforcement costs, including attorneys' fees, costs and disbursements in this action;

43. Declaring the Defendants' liability for response costs that will be binding on any subsequent action or actions to recover further response costs in connection with the Wellington Oro Site; and

44. Awarding the United States and the State such other and further relief as the Court may deem just and proper.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA:

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